UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 94-21-P-C***
	)	***(Civil No. 95-257-P-C)***
FRANK D. FARRINGTON,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Frank D. Farrington moves this court to correct his sentence pursuant to 28 U.S.C. § 2255. Farrington pleaded guilty to one count of conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C) and 846. He bases his motion on claims of miscalculation of his sentence and ineffective assistance of counsel.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (per curiam) (citation omitted). Finding Farrington's allegations to be either contradicted by the record or insufficient to justify relief if accepted as true, I recommend that his motion be dismissed without a hearing.

I. Background

Sometime in late October 1993 James Saravia and Eric Wing traveled to the apartment of Ray Dominguez in Salem, Massachusetts, where Saravia gave Dominguez two handguns in exchange for

7 grams of cocaine. Presentence Investigation Report, Docket No. 94-21-P-C-01 ("Presentence Report") ¶ 16.[1] After returning to Maine, Saravia and Wing met with Farrington and explained to him how they had received the cocaine. *Id.* ¶ 17. Farrington tested the cocaine, agreed to sell it and paid them $700 for it. *Id.*

Approximately one week later, Saravia and Wing again traveled to Massachusetts. *Id.* ¶ 18. This time, Saravia paid Dominguez $700 for 15 grams of cocaine. *Id.* Saravia and Wing then "fronted" that cocaine to Farrington. *Id.* Farrington and Darrell Muldoon met at Farrington's apartment and added approximately 3 grams of inositol, resulting in a total of 18 grams of a substance containing cocaine. *Id.* They used Farrington's triple beam scale to divide the cocaine into smaller quantities for resale. *Id.* Each took approximately half of the cocaine to sell to individuals in the Lewiston/Auburn community. *Id.* Within a few days, Farrington paid Wing and Saravia approximately $1,000, and Muldoon paid them approximately $500. *Id.*

The parties repeated this procedure approximately one week later, with Farrington and Muldoon dividing for resale 70.7 grams of a substance containing cocaine. *Id.* ¶ 19. They repeated the procedure again in late November 1993, with Farrington and Muldoon dividing for resale 106.75 grams of a substance containing cocaine. *Id.* ¶ 20.

On December 9, 1993 Farrington met with Saravia and Wing at their apartment. *Id.* ¶ 11. The next day Saravia and Wing drove to Dominguez's apartment, where Dominguez fronted them

[1] The sentencing court found the facts to be as set forth in the presentence report. Memorandum of Sentencing Judgment ("Sentencing Memo.") (Docket No. 27) at 2. At his sentencing hearing, Farrington said he had read the presentence report and did not believe anything therein to be incomplete, untrue or inaccurate. Transcript of Sentencing Proceedings ("Sentencing Trans.") (Docket No. 35) at 2, 4. Accordingly, I treat the facts set forth in the presentence report as undisputed.

cocaine and told them to sell it and bring him the money within a few days. *Id.* ¶ 22. Law enforcement officers arrested Saravia and Wing in Maine later that day and seized 244.8 grams of cocaine from Wing. *Id.* ¶¶ 13-14.

Farrington was indicted for conspiracy to possess cocaine with intent to distribute. Superseding Indictment (Docket No. 5) at 1. Represented by his court-appointed counsel, Farrington pleaded guilty. Transcript of Rule 11 Proceedings (Docket No. 33) at 3. The presentence report recommended that Farrington be sentenced for an offense involving 447.25 grams of cocaine. Presentence Report ¶¶ 24, 29. Farrington's counsel filed no objection to the presentence report. Declaration of Frank D. Farrington ("Defendant's Declaration") (Docket No. 39) ¶ 14.

The sentencing court found that the offense involved 447.25 grams of cocaine, and thus that United States Sentencing Commission Guideline ("U.S.S.G.") § 2D1.1(c)(10)[2] required a Base Offense Level of 24. Sentencing Memo. at 1. The court found Farrington eligible for a two-level downward departure based on his acceptance of responsibility for the offense. *Id.* at 2. Based on an Adjusted Total Offense Level of 22 and a Criminal History Category of I, the court found the applicable Sentencing Guideline range to be forty-one to fifty-one months. *Id.* Noting that neither party had requested a departure from the Guideline range, the court imposed the minimum sentence of forty-one months. *Id.* at 4. According to Farrington, he did not appeal his sentence because his counsel said that he had received a "good deal," and that if he appealed he could receive a longer prison sentence. Motion Under 28 USC § 2255 ("Motion") (Docket No. 31) ¶ 11(e).

[2] Because the court sentenced Farrington according to the 1993 edition of the United States Sentencing Commission Guidelines Manual, all references herein are to the 1993 edition. Although the court in its Sentencing Memo. referred to U.S.S.G.§ 2D1.1.(c)(1), it is clear that the intended reference was to § 2D1.1(c)(10).

II. Sentence Calculation

Farrington claims that the court improperly considered the 244.8 grams of cocaine found when Saravia and Wing were arrested, because he did not know they were buying the cocaine. Including these 244.8 grams in the relevant conduct raised his Base Offense Level from 20 to 24. *See* U.S.S.G. § 2D1.1(c)(10), (12). "A nonconstitutional claim that could have been, but was not, raised on appeal, may not be asserted by collateral attack under § 2255 absent exceptional circumstances." *Knight v. United States*, 37 F.3d 769, 772 (1st Cir. 1994). Although advised of his right to appeal his sentence, Sentencing Trans. at 14, Farrington did not appeal and cites no exceptional circumstances excusing that failure.[3] Accordingly, Farrington may not collaterally attack the calculation of his sentence. *Knight*, 37 F.3d at 773 (claims of erroneous factual finding and abuse of discretion in determining sentencing may not be raised for first time in § 2255 proceeding).

III. Ineffective Assistance of Counsel

Although Farrington did not explicitly claim ineffective assistance of counsel in his section 2255 motion, I will consider the ineffective-assistance-of-counsel argument set forth in his Response to the Objection of the Government ("Defendant's Response") (Docket No. 39) at 5-9. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (*pro se* inmate's § 1983 complaint held to less stringent standard than pleadings drafted by counsel).

To prevail on his ineffective-assistance-of-counsel claim, Farrington must satisfy the two-

[3] To the extent Farrington's motion may suggest that ineffective assistance of counsel excuses his failure to appeal, he nevertheless fails to demonstrate ineffective assistance of counsel. *See infra* § III.D.

prong test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). He must show that counsel's performance was constitutionally deficient, i.e., that it fell below an objective standard of reasonableness. *Matthews v. Rakiey*, 54 F.3d 908, 916 (1st Cir. 1995) (citing *Strickland*, 466 U.S. at 687-88). In doing so, he "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Strickland*, 466 U.S. at 689). Farrington must also prove that counsel's deficient performance likely prejudiced his defense. *Strickland*, 466 U.S. at 687. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

A. Mitigating Role (U.S.S.G. § 3B1.2)

Farrington argues that his counsel should have objected to the presentence report because it did not provide for a downward departure under U.S.S.G. § 3B1.2. Section 3B1.2 permits a decrease in the offense level based on the defendant's role in the offense. *Id.* "Minimal" participants receive a four-level decrease, "minor" participants receive a two-level decrease, and those falling between minimal and minor receive a three-level decrease. *Id.* A defendant bears the burden of proving entitlement to such downward departures. *United States v. Rosado-Sierra*, 938 F.2d 1, 1 (1st Cir. 1991).

The "minimal" designation "is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group," and should be used infrequently. U.S.S.G. § 3B1.2, comment. (nn.1-2). "[A] minor participant means any participant who is less culpable than

most other participants, but whose role could not be described as minimal." *Id.*, comment. (n.3). Both designations contemplate a defendant whose role in the offense "makes him substantially less culpable than the average participant." *Id.*, comment. (backg'd).

On four separate occasions, Saravia and Wing supplied Farrington with cocaine for him and Muldoon to resell. Farrington was an essential link in the distribution chain and fully understood the scope of the conspiracy. He is in no way less culpable than Saravia, Wing or Muldoon, nor is he less culpable than the average defendant. The First Circuit has upheld refusals to grant mitigating role departures in comparable circumstances. *See United States v. Garcia*, 954 F.2d 12, 14, 18 (1st Cir. 1992) (defendant introduced buyer to cocaine seller, acted as intermediary between them and accepted money on behalf of seller); *United States v. Osorio*, 929 F.2d 753, 764 (1st Cir. 1991) (defendant introduced buyer to cocaine seller, accompanied seller to site, vouched for cocaine quality and was to receive $300 from deal).

Under the circumstances, counsel's decision not to seek a section 3B1.2 departure falls well within the wide range of reasonable professional assistance. Moreover, Farrington has not shown any probability, let alone a reasonable probability, that the court would have granted such a departure. Accordingly, counsel's failure to object to the presentence report and seek a section 3B1.2 departure does not constitute ineffective assistance of counsel.

B. Relevant Conduct (U.S.S.G. § 1B1.3)

Farrington also argues that his counsel should have objected to the presentence report because it overstated the drug quantity used to calculate his Base Offense Level. "The drug quantity is to be derived from all acts 'that were part of the same course of conduct or common scheme or plan as the offense of conviction.'" *Garcia*, 954 F.2d at 15 (quoting U.S.S.G. § 1B1.3(a)(2)). Where, as here, the defendant is convicted of jointly undertaken criminal activity, "relevant conduct includes all acts reasonably foreseeable by the defendant and committed in furtherance of the jointly undertaken activity." *United States v. Flores-Rivera*, 56 F.3d 319, 331 (1st Cir. 1995). "To include disputed transactions as relevant conduct, the government must prove by a preponderance of the evidence a sufficient nexus between the conduct underlying the disputed transaction and the offense of conviction." *Id.*

Farrington claims he is not responsible for the 244.8 grams of cocaine seized on December 10, 1993 because he did not know that Saravia and Wing were buying it. He explains that he was part of a "hit and miss supplier conspiracy," i.e., he never knew beforehand when Saravia and Wing would show up with cocaine. Motion ¶ 12(A). By making this argument he impliedly concedes that, though he did not know *when* they would show up, he expected that they would eventually show up with cocaine for him to resell. Farrington has not argued, and the record does not suggest, that Saravia and Wing were delivering the 244.8 grams of cocaine to anyone other than Farrington. Thus, when they obtained the cocaine on December 10, 1993, their conduct "was both in furtherance of, and reasonably foreseeable in connection with," the conspiracy. U.S.S.G. § 1B1.3, comment. (n.2).[4]

[4] Farrington also claims to have told Saravia and Wing in late November 1993 "that I did[n']t (continued...)

Farrington's counsel could reasonably have believed that the evidence demonstrated a sufficient nexus between this final cocaine purchase and the conspiracy. Thus, his decision not to contest the relevant drug quantity falls well within the wide range of reasonable professional assistance. Furthermore, Farrington has not demonstrated a reasonable probability that the court would have disregarded the 244.8 grams if his counsel had objected. Accordingly, counsel's failure to object to the drug quantity in the presentence report does not constitute ineffective assistance of counsel.

C. Diminished Capacity (U.S.S.G. § 5K2.13)

Farrington argues that his counsel should have objected to the presentence report because it did not provide for a downward departure under U.S.S.G. § 5K2.13. Section 5K2.13 states: "If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense . . . ." Farrington argues that he has a "probable manic depressive behavioral disturbance," Defendant's Response at 7, which he self-medicated through the use of cocaine and/or alcohol, Defendant's Decl. ¶ 13.

According to the presentence report, Farrington has no history of psychological or psychiatric

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[4] (...continued)
think I would be buying anymore cocaine for a while. I told them I thought I needed to cool it for a while." Motion ¶ 12(A). However, sometime in early December 1993 Farrington accepted $800 from Saravia and Wing with which to buy cocaine from Richard Daniels. Presentence Report ¶ 21. The record does not reflect whether he ultimately made the purchase, but his acceptance of the money to buy cocaine refutes any possible suggestion that Farrington had abandoned his role in the conspiracy.

illness or treatment, other than two sessions with a counselor following his parents' divorce. Presentence Report ¶ 51. The report records Farrington's admissions to using cocaine and alcohol, but makes no reference to self-medication for a behavioral disturbance. *Id.* ¶ 52. As noted above, Farrington said he did not believe anything in the presentence report to be incomplete or inaccurate. Thus, Farrington's allegation of a manic-depressive behavioral disturbance is contradicted by the record and cannot support his ineffective assistance of counsel claim.[5]

D. Motion for Sentence Correction; Appeal of Sentence

Finally, Farrington argues that his counsel should have moved for correction of his sentence pursuant to Fed. R. Crim. P. 35(c) or appealed the sentence to the First Circuit, based on the grounds discussed above. Having found that counsel's failure to object to the presentence report on those grounds does not constitute ineffective assistance of counsel, I necessarily find that his failure to move for sentence correction or to appeal does not constitute ineffective assistance of counsel.

[5] Even if his allegation were true, nothing in the record, or even in Farrington's section 2255 memorandum and declaration, suggests a causal connection between his alleged diminished capacity and the cocaine-distribution conspiracy. A defendant is not eligible for a section 5K2.13 departure unless his diminished capacity contributed to his commission of the offense. U.S.S.G. § 5K2.13; *United States v. Lauzon*, 938 F.2d 326, 333 (1st Cir.), *cert. denied*, 502 U.S. 972 (1991). Furthermore, Farrington has not asserted that his counsel had any reason to suspect the alleged behavioral disturbance. Failure to seek a section 5K2.13 departure under these circumstances does not constitute ineffective assistance of counsel.

IV. Conclusion

For the foregoing reasons, I recommend that the petitioner's motion to correct his sentence be ***DENIED*** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 22nd day of April, 1996.

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David M. Cohen
United States Magistrate Judge